STATE OF NEW YORK

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January 30, 2003

Margery E. Lieber
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National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Dear Ms. Lieber:

We are writing in response to your letter of October 30, 2002 to Linda Angello, Commissioner of the New York State Department of Labor, concerning legislation recently enacted in New York State. Specifically, you have expressed concern that Chapter 601 of the Laws of 2002 of New York State (amendments to New York Labor Law § 211-a, hereafter referred to as "amendments") "may be preempted by the National Labor Relations Act ('NLRA')." You have asked for an explanation of the rationale for the law and a discussion of the preemption issue.

The underlying rationale for New York's restriction on the use of State funds for certain activities related to union organization and New York's legal position regarding NLRA preemption of New York Labor Law § 211-a were previously communicated to the NLRB by the New York State Attorney General's office in response to a December 22, 1999 inquiry of Meredith Burns. The recently enacted amendments to that statute expand the scope of the activities upon which New York restricts the use of State funds, but do not otherwise materially change the law with regard to the preemption issue. New York's position, as contained in that response, remains essentially unchanged. We have attached a copy of that position statement and, to the extent possible, will not duplicate those comments in this letter, which contains factual observations about the amendments and additional legal support for our view.

First, we submit that your conclusion that the amendments to Labor Law § 211-a will "effectively regulate conduct that Congress intended to be free from governmental regulation" is premised upon several faulty factual assumptions about New York's law. You state that the "law imposes a requirement of employer neutrality during union organizing drives by restricting state funds from being used to encourage or discourage unionization." As a factual matter, the scope of the law is much narrower than that. Prior to the amendments, Labor Law § 211-a only prohibited the use of State funds for training managers, supervisors and other administrative personnel in discouraging union organization activities. The amendments add two new discrete activities that employers may not fund with State monies: hiring consultants, attorneys or other consultants to encourage or discourage union organization and hiring (or paying) employees whose principal job duties are to encourage or discourage union organization. In addition, it is important to note that the new statute is truly labor-neutral on its face, as it expressly prohibits the use of State monies to fund the aforementioned activities to *encourage* or discourage organization. Further, the law does not proscribe employees from engaging in other types of activities to encourage or discourage union organization using State monies. For example, one of the primary methods employers use to influence employees on union issues is talking to employees at mandatory meetings on work time, commonly known as captive audience meetings. The costs of these meetings are not covered by New York's law.[1] Thus, while you voice concern that New York's law will conflict with federal policy favoring "free speech," the statute and its amendments are completely silent on the issue of employer speech and instead focuses on the training and hiring of individuals using State monies.

You also refer to New York's "burdensome record keeping requirements." We submit that your conclusion that the record keeping requirements are burdensome is, at the very least, premature, as the statute authorizes the Commissioner to promulgate record keeping regulations that have not yet been issued. The record keeping requirements are designed to ensure the integrity of State funds by giving New York the ability to determine whether funds are, in fact, being spent on prohibited uses. The statute only requires records sufficient to demonstrate that the State funds were not used for a prohibited purpose after they were received by the employer. We submit that record keeping is a far less onerous requirement than the program integrity and segregation requirements found constitutional in Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759 (1991) and Velazquez v. Legal Services Corporation, 164 F.3d 757 (2d Cir. 1999). It is quite common that recipients of governmental funding are subject to detailed financial requirements including the requirement to keep additional records sufficient to demonstrate that the funds were actually used for their intended purposes. See inter alia City of New York v. Shalala, 34 F.3d 1161 (2d Cir 1994); 29 C.F.R . § 50; 45 C.F.R. § 74.52 ; 45 C.F.R. § 1301.12(a); 42 C.F.R. § 59.212(a).

You also express concern over "punitive civil penalties" and "treble damages" provisions provided for in the law. In the event an employer fails to comply with the funding restrictions, New York requires misspent funds to be returned and imposes a penalty of $1,000 upon the funding restriction violation. Even if the unauthorized use of State funds is wilful or repeated, the penalty remains only a monetary one: a fine of three times the misspent funds. In contrast, the federal government has reserved to itself a host of remedies for failure to materially comply with limitations on the use of federal funds (including the limitation in certain programs that the funds are not to be used to assist, promote or deter union organizing). These remedies include recouping the misspent monies and terminating participation in the federal program and/or terminating all or part of the federal funds. See 45 C.F.R. § 74.62 ; 29 C.F. R.§ 61. We submit that monetary penalties are far less drastic than terminating the financial assistance or the government contract altogether.

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[1] The cost of any managerial employee's salary would only be covered by the law if their principal job duties were to encourage or discourage union organization.

Furthermore, you misapprehend the Attorney General's authority under the amendments. The Attorney General does not have the authority to prosecute employers for violation of the State funding restrictions. He is given authority to seek a civil injunction against continuing violations of the law and an injunction seeking reimbursement to the State of the misspent funds. The federal government also reserves to itself the ability to seek injunctive relief in its grant administration procedures. 29 U.S.C. § 2931 (c)(3)(b). The Attorney General already has general authority under New York Executive Law § 63 (12) to seek injunctions in instances of "persistent and repeated violations of the law" and has used that authority to enforce the State funding restrictions that existed in law prior to the amendments. The amendments simply give the Attorney General the authority to enforce the funding limitations without regard to whether a violation of that restriction is repeated or persistent.

In your letter, you indicate that you believe these record keeping and enforcement provisions of the amendment "go well beyond New York's choice not to fund certain conduct." However, we maintain that these provisions simply implement that choice with methods and procedures common to governmental funding programs. New York's choice not to fund certain activities is legally permissible. Just as in Rust and Velazquez, the procedures designed to ensure the programmatic integrity of those funding decisions does not transform those funding limitations into impermissible regulation of the activities New York chooses not to fund.

Your letter refers generally to "preemption by the NLRA." The earlier position statement of the Attorney General addressed preemption under the doctrines contained in both San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) and Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) and we now supplement that position.

Garmon preemption forbids state and local regulation of activities that are "protected by [Section] 7 of the [NLRA] or constitute unfair labor practices under [Section] 8." Garmon, 359 U.S. at 244. Garmon preemption prevents state interference with the primary jurisdiction of the National Labor Relations Board. Golden State Transit v. City of Los Angeles, 475 U.S. 608, 613 (1986). We have previously set forth our position that New York's limitation on State funds is not a *regulation* of employer speech. In addition we submit that Garmon preemption is inapplicable because employer speech, while permitted by the NLRA, is not a right affirmatively protected by the NLRA. We believe the Department of Justice's position in Building and Construction Trades Department, AFL-CIO, et al., v. Joe Allbaugh, et al., 295 F.3d 28 (July 12, 2002), fully supports this conclusion.

In your letter, you refer to "rights under the NLRA to freely discuss labor relations issues during union organizing." Section 7 of the NLRA describes the activities that the act protects by guaranteeing employees certain rights. See 29 U.S.C. § 157. Employer speech is nowhere mentioned in Section 7. Section 8 of the NLRA describes the activities that the act prohibits by providing that certain acts are unfair labor practices. It generally makes it an unfair labor practice for an employer to interfere with the exercise of Section 7 rights and for a labor organization to restrain employees in the exercise of their rights. See 29 U.S.C. § 158. Section 8 (c) of the act provides that "the expression of any views . . . shall not constitute evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158 (c).

By its own terms, Section 8 (c) does not provide for an affirmative protection of employer free speech that is enforced by the NLRB. It simply clarifies that the unfair labor practice provisions of Section 8 (a) may not be interpreted to extend to non-coercive speech within the ambit of the First Amendment. Any affirmative protections for employer speech are found in the First Amendment, not the NLRA. As the Supreme Court explained in NLRB v.Gissel Packing Co., 395 U.S. 575, 617 (1969), Section 8 (c) "merely implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be 'evidence of an unfair labor practice'..." Gissel, 395 U.S. at 617. For these reasons, even if New York's funding limitations were erroneously viewed as regulating employer speech, Garmon preemption would be inapplicable because employer speech is not protected by the NLRA in the sense necessary for Garmon preemption.

This interpretation of NLRA and Garmon preemption is fully supported by the Justice Department as demonstrated by their recent arguments to the Court of Appeals in Allbaugh. Allbaugh involves a Presidential Executive Order concerning project labor agreements ("PLA"). Section 8 (e) of the NLRA generally bars secondary agreements between unions and employers. However, such agreements are permissible under the construction industry proviso of Section 8 (e). The Justice Department recognized that Garmon preemption "prohibits state regulation that impinges on the regulatory jurisdiction of the [NLRB] in regulating activities that are protected by Section 7 or constitute an unfair labor practice under Section 8 of the NLRA." (citations omitted). (Brief p. 34). However, the Justice Department asserted that "[i]t does not apply to activity that is merely permissible under section 8. That project labor agreements in the construction industry are exempted from the general ban imposed by section 8 (e) does not transform them into activity protected by Section 7." (Brief p. 34). Similarly, that non-coercive employer speech cannot be evidence of an unfair labor practice pursuant to Section 8 (c) of the NLRA does not transform it into a protected activity under Section 7. Garmon preemption is not applicable.

Furthermore, even if Section 8 (c) of the NLRA were interpreted to provide an affirmative protection for employer speech, we are unaware of any claim that the NLRA protects the rights of employers to have the State subsidize their speech. Nothing in New York's law prohibits employers from engaging in speech in the form prohibited by the law from being funded by State money, they are simply prohibited from using State funds to train, hire or pay the salary of certain individuals.

The Machinists preemption doctrine prohibits State regulation of areas that have been left "to be controlled by the free play of economic forces" Machinist, 427 U.S. at 140. The critical inquiry is whether Congress intended to leave certain areas unregulated. Golden State, 474 U.S. at 614. There is no indication in the NLRA that Congress intended to preclude states from imposing restrictions on the use of their own funds. As we demonstrated in our previous position statement, Congress itself has repeatedly imposed restrictions upon federal funds that are similar to, but even broader than, New York's restriction. "The fact that Congress itself has . . . imposed the same type of restriction . . . as [a state] seeks to impose . . . is surely evidence that Congress does not view a restriction as incomparable with its labor policies." DeVeau v. Braisted, 363 U.S.144, 156 (1960) (plurality opinion).

Finally both Garmon and Machinist preemption are implicated only when a State is regulating. As the Supreme Court stated in Building and Construction Trades Council v. Associated Builders and Contractors of Mass./R.I. Inc., 570 U.S. 218 (1993) ("Boston Harbor"), "The NLRA prevents a state from regulating within a protected zone, whether it be a zone protected and reserved for market freedom or for NLRB jurisdiction. A State does not regulate, however, simply by acting within one of those protected zones." Id at 227. In Boston Harbor the Supreme Court found that State of Massachusetts, as owner of a construction project, was acting in a propriety capacity and its actions were not subject to NLRA preemption.

The Allbaugh decision from the U.S. Court of Appeals for the District of Columbia Circuit illustrates the difference between regulating and acting in a proprietary capacity. The Justice Department's position in that case was "[l]ike a private party, the government in its spending decisions is free to require any terms that might protect its proprietary interests, including terms addressing labor relations." (Brief p. 29). "There is nothing inherently regulatory in a general procurement policy so long as the procurement policy does not seek to influence or penalize conduct outside the scope of the project in which the government has a proprietary interest. "(Brief of Appellant p. 34). It is apparent that the Justice Department's position on the scope of proprietary activity under the NLRA is quite broad and easily encompasses New York's statute. New York has determined that it is in its economic interest in ensuring the efficient use of its funds to place some unionization-related restrictions upon the use of its funds. New York does not seek to influence or penalize conduct outside the scope of projects in which it has a proprietary interest.

In Allbaugh, the Court stated that it did not need to examine the issue of whether Garmon or Machinists preemption applied, because it "clearly constitutes propriety action rather than regulation." Allbaugh 295 F.3d at 34. The Court reasoned "...the Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a propriety capacity." Id at 36 . Instead, the restrictions are placed only upon the use of State funds on State-assisted projects or programs. Since New York is acting only to ensure that State funds are spent only for those purposes for which they were appropriated, it is acting as a proprietor, and the question of preemption is avoided.

Finally, we should point out that while the amendments are now in effect, the regulations have not yet been promulgated. In addition, there are no pending investigations under the amendments. We do believe that all of your concerns can be completely addressed after all implementing regulations have been developed and promulgated.

If you have continuing questions or concerns about New York's statute based upon this response, please contact the undersigned to schedule a meeting to discuss them in more detail.

Very truly yours,

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Enclosure
cc: Linda Angello
Eliot Spitzer

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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Attorney General

STATE COUNSEL DIVISION
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January 10, 2000

Via Facsimile (202-273-1799) and U.S. Mail

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Re: Position Statement Concerning New York Labor Law § 211-a

Dear Ms. Burns:

This statement is in response to your December 22, 1999 request for a statement from the New York State Attorney General's Office explaining this office's position that New York Labor Law §211-a ("Section 211-a") is not preempted by the National Labor Relations Act ("NLRA"). You informed our office that Ulster-Greene Counties Chapter, NYSARC, Inc. ("Ulster-Greene ARC"), currently the subject of an investigation by the New York State Attorney General's Office, contacted the National Labor Relations Board ("NLRB") regarding Section 211-a, which provides that "no monies appropriated by the state for any purpose shall be used or made available to employers to train managers, supervisors or other administrative personnel regarding methods to discourage union organization."

As you note in the December 22, 1999 letter to our office, the United States Supreme Court has prohibited state regulation of activities arguably protected or prohibited by the NLRA (San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244, 246 (1959)), as well as state regulation of areas that have been left to the free play of economic forces (Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 147 (1976)). However, "pre-emption doctrines apply only to state *regulation.*" Building & Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 227 (1993) (emphasis in original) ("Boston Harbor"). Section 211-a is a limitation on activities New York chooses to fund; it does not involve regulation by New York State of any activities protected or prohibited by the NLRA, nor does it regulate an area left unregulated by the NLRA, and thus is not preempted by the NLRA.

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The word "regulate" means "to fix, establish, or control; . . . ; to direct by rule or restriction;. . . to foster, protect, control, and restrain; [also] to govern or direct according to rule or to bring under control of constituted authority, to limit and prohibit." Black's Law Dictionary, 6th Ed. (1990). Laws intending to "regulate" a given entity or activity are those which "possess the 'end, intention, or aim' of adjusting, managing, or controlling" that entity or activity. U.S. Dept. of Treasury v. Fabe, 508 U.S. 491, 113 S.Ct. 2202, 2210 (1993) (internal citation omitted) "'To regulate' . . . is to foster, protect, control, and restrain." Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1, 32 S.Ct. 169, 174 (1912). These various definitions of the word "regulate" indicate that in order for a state's action to constitute "regulation," that action must have the effect of controlling, restraining, encouraging, or prohibiting behavior -- in short, in some way dictating or restricting behavior.

Section 211-a does not control, restrain, foster, limit, or prohibit any behavior subject to the NLRA on the part of Ulster -Greene ARC or any other employer. Under Section 211-a, employers may still avail themselves of all of their rights under the NLRA, including holding trainings of managers, supervisors or other administrative personnel regarding methods to discourage union organization ("Management Union Discouragement Trainings"). Section 211-a does not encourage employers to hold such meetings, prevent them from holding such trainings, or penalize them in any way for doing so. Section 211-a only prevents employers from funding such trainings with state money, if such trainings do occur. Thus, Section 211-a does not regulate any *activity* subject to the NLRA in which an employer may engage; instead, Section 211-a merely directs that *state funds* must not be used to pay for a particular activity.

The Supreme Court has repeatedly held that the government's failure to fund an activity does not constitute regulation of that activity, and that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." Regan v. Taxation with Representation of Washington, 461 U.S. 540, 103 S.Ct 1997 (1983) (upholding a tax exemption for certain nonprofit organizations that do not engage in lobbying). In Taxation with Representation, the Court, treating tax exemptions as analogous to funding appropriations, ruled that "[a]lthough TWR [the nonprofit group Taxation with Representation] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." Taxation with Representation at 2003 (internal quotations omitted). The Court concluded that "[t]he issue in this case is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby . . . we hold that it is not." Taxation with Representation at 2004.

In Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759 (1991), the Supreme Court upheld

Department of Health and Human Services ("HHS") regulations of the prohibiting projects receiving federal Title X funds from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. The Court noted that a government choice not to fund a given activity is not tantamount to an infringement on the right to engage in that activity: "A legislature's decision not to subsidize the exercise of a fundamental right does not infringe on the right . . . A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity." Rust at 1772. The Court upheld the right of the government to place "a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope," Rust at 1772-73, and interpreted the HHS regulations as merely "insisting that public funds be spent for the purposes for which they were authorized." Rust at 1774. The Court emphasized that "[t]he government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected." Rust at 1776. Central to the Court's determination that the HHS regulations violated no constitutional rights was its observation that the Title X grantee health organization was free to continue to engage in abortion counseling, referral, provision, and advocacy "through programs that [were] separate and independent from the project that receives Title X funds." Rust at 1774.

Notably, the HHS regulations at issue in Rust were substantially more onerous upon Title X grantees than Section 211-a is upon recipients of New York State funds. The HHS regulations required Title X projects to be physically and financially separate from prohibited abortion activities, specifying that "'a Title X project must have an objective integrity and independence from prohibited activities'" and that "'[m]ere bookkeeping separation of Title X funds from other monies is not sufficient.'" Rust at 1766 (citing 42 C.F.R. 59.9 (1989)). The Court noted,

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

Rust at 1775.

Later cases have followed Rust's distinction between opting not to fund certain activities and regulating or restricting them. In National Endowment for the Arts v. Finley, 524 U.S. 569, 118 S.Ct. 2168 (1998), the Court rejected a First Amendment challenge to a statute which required the National Endowment for the Arts (NEA) to consider "general standards of decency" when allocating funding. The Court noted that "[s]o long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities." Finley at 2179. The distinction between impermissible regulation of an activity and permissible funding decisions covering an activity was recognized: "government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." Id.

In Velazquez v. Legal Services Corporation, 164 F.3d 757 (2d Cir. 1999) the Second Circuit assessed a constitutional challenge to restrictions imposed by Congress and the Legal Services Corporation ("LSC") on entities receiving LSC funding. The LSC restrictions included prohibitions on certain activities, such as lobbying, class actions, and prisoners' rights cases. Like the restrictions at issue in Rust, the final LSC restrictions in Velazquez also contained a "separate and distinct" component which allowed LSC grantees to maintain a relationship with "affiliate" organizations engaging in restricted activity so long as the relationship between the organizations met standards of "program integrity" including separate personnel, separate facilities, and separate accounting and timekeeping records. The Second Circuit rejected a First Amendment challenge to the program integrity requirement, holding that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." Velazquez at 766.

Section 211-a falls squarely within the pattern of those government activities upheld under Taxation with Representation, Rust, and their progeny. The State of New York, through 211-a, is simply opting not to subsidize a particular activity, Management Union Discouragement Trainings. As the above cases make clear, that an activity is protected by statute or by the Constitution does not mean that the government must elect to fund that activity. In the words of Rust, "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." Rust at 1772. Further, Section 211-a is significantly less burdensome on a recipient of state funds than the restrictions at issue in both Rust and Velazquez, in that the restrictions in those cases required rigorous physical and financial separation of entities. Section 211-a does not require a recipient of state funds that wishes to hold Management Union Discouragement Trainings to establish any separate facility, personnel, or even separate accounting books. At most, Section 211-a requires recipients of state funds to account for funds used for Management Union Discouragement Trainings in a separate and discrete manner within the entity's already-existing accounting system.

Significantly, Congress has for years included similar provisions in several cost-based federal programs, reflecting the concern that funding allocated for a particular public end be utilized for its intended purposes. Both the Job Training Partnership Act and its successor Workforce Investment Act contain a provision that "[e]ach recipient of funds . . . shall provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C. § 1553(c)(1) and 29 U.S.C. §2931(b)(7) respectively. The medicare statute specifically disallows reimbursement of "costs incurred for activities directly related to influencing employees respecting unionization." 42 U.S.C. §1395x(v)(1)(N). The Head Start

Programs Act states that "[f]unds appropriated to carry out this subchapter shall not be used to assist, promote, or deter union organizing," 42 U.S.C. §9839(e), and the National and Community Service Act provides that "[a]ssistance provided under this title shall not be used by program participants and program staff to — (1) assist, promote, or deter union organizing." 42 U.S.C. §12634(b)(1). Like Section 211-a, these federal statutory provisions attempt to ensure that when money is allocated for a particular purpose, it is ultimately utilized in its intended manner.

Section 211-a reflects New York State's decision not to fund a particular activity -- and to attempt to ensure that funds appropriated for another given activity are in fact used for that intended purpose. If the New York State legislature allocates funding for a program for developmentally disabled individuals, but in fact a portion of this government funding is spent on fees for consultants to provide Management Union Discouragement Trainings, then the New York State government and New York State taxpayers are not getting their money's worth. Similarly, if the government and taxpayers are reimbursing an entity such as Ulster-Greene for a supervisor's salary on the assumption that the supervisor is managing employees performing a government contract but the supervisor in fact spends a significant portion of his or her time preparing, leading, or attending Management Union Discouragement Trainings, again the government and taxpayers are not getting their money's worth. When New York State provides funding for particular goods or services, the state is paying for the acquisition of those goods or services, not for Management Union Discouragement Trainings -- or, for that matter, for any other activity of the employer unrelated to the goods and services sought by the state. Section 211-a exemplifies the state acting as a prudent consumer, attempting to spend its limited dollars only on the product it wishes to purchase.

In this way, Section 211-a is akin to the HHS restrictions in Rust, which ensured that public funds were "spent for the purposes for which they were authorized" Rust at 1774. The Rust restrictions, went further, however, requiring separate facilities to ensure that such funds reached their intended purposes. The LSC restrictions in Velazquez similarly required separation of facilities and funds to ensure that LSC funds were in practice directed toward the intended activities which the government elected to fund. In both of those cases, the conducting of activities that the state had chosen to subsidize in close proximity (i.e., potentially within the same organization) to activities that the state had opted not to fund created a risk that funds would be commingled and that state funds would not ultimately be utilized for their intended purposes. The restrictions were structured in a manner which enabled the continuance of both sets of activities (those which the state chose to fund and those which the state did not) -- but which also ensured that public funding was used as intended. Similarly, Section 211-a enables both sets of activities to continue -- those which the state has chosen to fund (which vary depending upon the employer in question) and those which the state has not (Management Union Discouragement Trainings). In this context, Section 211-a aims to ensure that state funds are used only for those activities which the state has decided to fund, such as programs and services for developmentally disabled people, as in the case of Ulster-Greene ARC. This attempt to ensure that state appropriations actually reach their intended destination does not represent state regulation.

In its failure to regulate any activity subject to the NLRA, Section 211-a is qualitatively different from NLRA preemption cases such as Wisconsin Dept. of Industry v. Gould, Inc., 475 U.S. 282, 106 S.Ct. 1057 (1986) and its progeny. The statute at issue in Gould completely prohibited repeat violators of the NLRA from doing business with the State of Wisconsin for three years. This penalty punished repeat NLRA violators and by so doing limited businesses' behavior -- i.e., the statute regulated. Similarly, the Executive Order that was found preempted in Chamber of Commerce of the United State v. Reich, 74 F.3d 1322 (D.C. Cir. 1996), involved a potential complete disqualification from federal government contracts of employers who permanently replaced lawfully striking employees. In contrast, Section 211-a contains no provision that would prevent the State of New York from continuing to provide funding for or enter into contracts with any entity that had violated Section 211-a. New York State can and will continue to do business with organizations that have violated Section 211-a.

In addition, Section 211-a stands in contrast to cases in which state action conditioned licensing or certification upon certain labor activities. For example, in Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 106 S. Ct. 1395 (1986), the Court found that the city of Los Angeles was preempted from threatening to bar taxi license renewal in order to influence a labor dispute. Similarly, in Van-Go Transport Co., Inc. v. New York City Board of Education, 53 F. Supp.2d 278 (E.D.N.Y. 1999), the court ruled that New York City Board of Education was preempted from refusing to certify conditionally a replacement workforce for a contractor's striking workers. In Golden State and Van-Go, the denial of a license and of a conditional certification served as a penalty, thereby having an impact on these companies' behavior. In contrast, Section 211-a has no impact on the approval of any license, permit, or certification for conducting any given business or not-for-profit activity in New York State, and thus does not act as a penalty. Section 211-a contains no liquidated damages or other damages provision. In fact, New York State has two courses of action under Section 211-a: (1) to attempt to recoup any misspent funds; and (2) to seek an order enjoining such misuse of the public fisc in the future.

The legislative history of Section 211-a lends further credence to the position that Section 211-a does not regulate activity subject to the NLRA. Nowhere in the legislative history is there evidence that the legislature wished to prevent employers from holding Management Union Discouragement Trainings, nor is there evidence of a legislative desire to bar from state contracts or otherwise punish employers who would hold such trainings. The legislature's sole concern was that state funds not be used in this manner. Indeed, the Budget Report on Bills, in its final recommendation, emphasized that "this bill would prevent the misuse of State funds." Budget Rep. on Bills, B201 (N.Y. 1996).

NLRA preemption only applies when a state action *regulates*. Section 211-a is not preempted because it does not control, restrain, foster, limit, or prohibit -- it does not regulate the NLRA-subject activity of Ulster-Greene ARC or of any other entity. Instead, Section 211-a merely represents a state decision not to fund certain activities while allowing such activities to continue when funded from alternate sources.

If you have any further questions or would like any additional information, please do not hesitate to contact me at (212) 416-8442.

Very Truly Yours,

Terri Gerstein

Terri Gerstein
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